UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,887.

CLINTON FOODS, INC., a Delaware Corporation,
Appellant,

vs.

MARVIN A. YOUNGS,
Appellee.

PETITION FOR REHEARING.

STATEMENT OF GROUNDS.

The appellant respectfully requests the Court to grant a rehearing of its appeal and assigns the following grounds therefor:

I.

The majority opinion indicates that the judges joining therein misconstrued the Record as to certain elements of fact.

II.

The majority opinion cites a number of cases which were not cited nor argued on the appeal but which had been so thoroughly distinguished in the briefs at the hearing on the motion that plaintiff had abandoned them, and which can be distinguished from the case involved herein.

III.

The majority opinion fails to recognize the knowledge of appellee's employer and the legal proposition that such knowledge provides a conclusive defense.

Where we refer herein to "the opinion," we have reference to the majority opinion written by Judge Matthes. To avoid confusion we will refer to appellant and appellee as defendant and plaintiff, respectively.

(I and II eliminated as dealing with matters not now under consideration.)

III.

The Majority Opinion Fails to Recognize the Knowledge of Appellee's Employer and the Legal Proposition That Such Knowledge Provides a Conclusive Defense.

The statement on page 11 of the opinion that defendant's position is two-fold, followed by setting out two of the points which we raised on appeal, would indicate that these were the only contentions presented. We believe that one of the omitted points constitutes a complete defense, as a matter of law. We refer to Point II, subdivision (3), argued on pages 26-34 of our original brief. This point dealt with the knowledge of plaintiff's employer. Pittsburgh was aware of the danger in the specific instrumentality which injured plaintiff and no jury could have found otherwise.

If this Court refuses to recognize the validity of this defense, we sincerely believe that it should say so. It would seem only fair that those who, in the future, engage independent contractors, be informed, before reaching an appellate court, that they can no longer rely upon the custom which invariably prevails among independent contractors and those who contract with them; the language of Sec. 979 of White's Supplement to Thompson on Negligence which purports to state the rule; the doctrine announced by the Supreme Court of Pennsylvania in **Engle v. Reider**, 77 A. 2d 621, and the holding in **American District Telegraph Co. v. Kittelson**, 179 F. 2nd 946, cited on

this point on page 34 of our original brief, in which Judge Graven's instruction that "* * * if you find that the condition * * * did present a hidden defect, danger, or pitfall to persons using thereof, and * * *, then the failure to warn the defendant or its employees of such hidden defect, danger, or pitfall constituted negligence * * *", was objected to, not by the defendant, but by one who stood in the shoes of the plaintiff, and was approved by this Court which said, "The Iowa cases support the charge."

It is with mixed emotions that we invite the Court to pass specifically on this point. In our judgment it will be a sad day for our economy should this Court, or any Court, construe the law to require that those who contemplate projects such as this defendant undertook, inform, at their peril, every employee whom the independent contractor may, from day to day or hour to hour, bring on the job, of dangers of which he knows the contractor to be aware, and be able to present conclusive evidence that they have done so. However, it will be a far sadder day in the history of our jurisprudence if a litigant can justifiably say that he sought the judgment of the Court and was denied determination of a basic and decisive question.

We realize that there are many cases in which courts can properly reach decisions without passing upon all of the points raised by the loser. A litigant has no right to insist that a court express its views on a point made by him if other points require a decision against him. On the other hand, if there remains a question of law which, if resolved as he contends, would be decisive in his favor, he is entitled to have it passed upon. Any decision which ignores it denies him his day in court as effectively as though the court had refused to hear him at all.

We insist that the latter situation obtains here. We recognize that a close question exists as to whether the plaintiff, personally, knew or was warned of the danger

as a matter of law, and, though we believe he was aware, we could accept an adverse decision on these points gracefully. However, the contention which we have urged most strongly throughout the appeal, and on which we have placed our greatest reliance, has not been passed upon. Had we not urged the other points but relied only upon Pittsburgh's knowledge, the Court would have been obliged to pass upon the contention. Surely the Court will not refuse to do so because we did not so limit the appeal and, in the interest of our client, presented other contentions as to which we, in good faith though perhaps mistakenly, felt it should prevail.

If it is the law that the duty to warn is discharged by warning the contractor or that no warning is necessary where the contractor is aware of the danger, then defendant was entitled to a directed verdict. If it is the law that, irrespective of the contractor's knowledge, the owner must see that all of the contractor's employees are warned, then (assuming the majority to be correct in its decision as to the other points) the verdict should stand.

In the case at bar, the Court has failed to decide a point which, if decided in accordance with our contention, required a directed verdict even though every other point was properly decided in favor of the plaintiff.

If it was for the jury to say whether plaintiff had been adequately warned and whether he knew or in the exercise of reasonable care should have known of the danger, he is nevertheless barred from recovery against Clinton if Pittsburgh's knowledge relieved Clinton from the duty imposed under the doctrine of **Gowing v. Henry Field.** If the Court has correctly held that the giving of specific warnings as to the bus bar rendered the general warnings inadequate and misleading so far as plaintiff and other crew members are concerned, no such question of adequacy exists in respect of the knowledge of his employer.

Morgan was Pittsburgh. He testified unequivocally that he had knowledge that the danger was not limited to the bus bar or the corrugated transformers; that he knew the whole area was hot and that the wires were hot.

We contend that this relieved Clinton of all affirmative obligation and there is no basis for recovery.

We respectfully submit that the majority has either overlooked our contention as to the sufficiency of the employer's knowledge, or that it has failed to appreciate the fact that its interpretation of the Record and of the inferences which a jury would be justified in drawing did not dispose of that contention.

Perhaps reasonable minds might differ as to what the plaintiff heard or what he knew or should have known. They could not differ as to what Morgan **knew**. That being so, and plaintiff did not urge to the contrary, the right of plaintiff to a verdict depends squarely upon a question of law which the Court has not passed upon.

We respectfully urge the Court to reconsider its decision and grant a rehearing.

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Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is submitted in good faith and that we believe it to be meritorious.

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